

1 of those going to the jury.

2 THE COURT: Joint Exhibit, what, Roman  
3 Numeral --

4 MR. ARNTZ: Joint Roman Numeral I is  
5 the videotape cassette of the Elofskey interview. And  
6 State Exhibit 79 is the cassette of the Polson  
7 interview.

8 THE COURT: All right. Dealing with  
9 these then in the order to which they were objected  
10 to. All other objects not objected to, the Court will  
11 admit.

12 MR. ARNTZ: That's correct.

13 THE COURT: All other exhibits then  
14 with the exception of those objected to at the time  
15 will be admitted.

16 And the first numerical  
17 objection relates to 38. 1 through 37 are admitted.  
18 That is the gun envelope which includes the dark gun,  
19 as I have it, the magazine and three live rounds. Any  
20 argument, Mr. Slavens?

21 MR. SLAVENS: I think there's been a  
22 sufficient gathering of the, the collection of that  
23 gun by Rick Smith, who's marked it and tagged it and  
24 so identified it in front of the Court.

25 THE COURT: Does the defense want to be

1 heard on that?

2 MR. ARNTZ: I think that item was not  
3 connected to this defendant. The recovery of it  
4 specifically was not related in any way to this  
5 defendant's possession immediately prior to it.

6 THE COURT: All right. The objection  
7 to 38 will be overruled. That will be admitted.

8 Now, as it relates to  
9 number 42 is the next one.

10 MR. ARNTZ: That's correct.

11 THE COURT: 39 through 41 will be  
12 admitted.

13 42 is a package with a  
14 shirt and stocking in it. What's the State's position  
15 on that?

16 MR. SLAVENS: We believe as to that  
17 specific exhibit with the two items, there is ample  
18 testimony concerning the, what I will call, the  
19 stocking as to where it was located and to one  
20 witness, I recall, vividly described how this  
21 defendant, Weston Lee Howe, did, in fact, did have the  
22 stocking in his hand. That was Patrolman Wiesman  
23 coming up upon him. And, therefore, I think  
24 abundantly clear that matter is related to this  
25 defendant.

Green shirt, it's in the photograph itself. Also, I mean, as a photograph indicates and referenced in the exhibit as to where it was found. I will admit it's not in the exact location as to where this defendant was finally located and/or where Polson was located but it's across the path that they traveled as they came between the two houses. And Polson's, if you will, lack of shirt, well, as to the green shirt I still so move it to be introduced.

The stocking, I think, your Honor, is quite clear as to this defendant.

THE COURT: Any rebuttal or response?

MR. ARNTZ:                    There was no testimony connecting the green shirt to our client in any manner whatsoever. As the prosecutor pointed out, nor was the green shirt related to either co-defendants. It was simply found on the ground during a chase, as I understand it. Its probative value is minimal to none.

Also, the stocking, if I recollect correctly, the State's witness who made mention of the stocking is, I believe, is the same State's witness who failed to identify our client in the course of his testimony and we made objection at

1 that time at side bar. And I think asked the Court to  
2 strike his testimony because, again, he was not able  
3 to, apparently to point out our client as the person  
4 he saw discard anything.

5 MR. MONTA: That was Officer Jackson  
6 for the record.

7 MR. SLAVENS: Wiesman is the one who  
8 testified about this defendant having a stocking and  
9 who did, in fact, identify this defendant.

10 THE COURT: Well, the Court is going to  
11 permit the stocking. I don't -- there is only one  
12 exhibit though -- Let's do this, because, because the  
13 defendant is objecting, the Court will exclude,  
14 sustain the objection as it relates to the green  
15 shirt, that portion of 43, 42, excuse me, 42. That  
16 portion of 42, which is the green shirt. The stocking  
17 will be admitted.

18 Let's go off the record a  
19 minute.

20 (WHEREUPON, a discussion was held off the  
21 record.)

22 THE COURT: 42, the stocking has been  
23 admitted and Mr. Slavens has suggested that it be  
24 remarked 42-A for an individual package. That will be  
25 done. The shirt will be kept with the rest of the

1 exhibits that are not admitted.

2 MR. SLAVENS: You want to do that now.

3 (WHEREUPON, State's Exhibit 42-A was marked  
4 for identification.)

5 THE COURT: The next exhibit is,  
6 objection is to what?

7 MR. SLAVENS: 43, the Raven.

8 THE COURT: You want to be heard on  
9 exhibit 43, the Raven?

10 MR. ARNTZ: We feel that 43 was not  
11 related to or connected to our client sufficiently to  
12 be admitted. We feel that no one has identified that  
13 weapon to the effect that our client was actually in  
14 possession of it or used it in any manner.

15 THE COURT: Mr. Slavens.

16 MR. SLAVENS: I don't believe that's the  
17 correct test anyway but irrespective of that, I think  
18 the gun has been fully properly marked, tagged,  
19 identified and connected up, one, to this whole case,  
20 basically all, or the two other defendants who  
21 testified.

22 THE COURT: All right. Exhibit 43 will  
23 be admitted.

24 All the exhibits 44 through  
25 47 are admitted.

1 48 there is an objection.

2 That's the box of contents apparently found in the  
3 sewer. Does the defendant want to be heard on that?

4 MR. MONTA: Judge, what we are  
5 objecting to are the items which are not clearly  
6 marked as belonging to anybody involved in this case.  
7 They were scattered in the sewer and collected. Some  
8 things are not identifiable and were not identified at  
9 trial as belonging to the decedent McDonald.  
10 Certainly the things that have his name on it, connect  
11 up to some testimony that it was in that location but  
12 not all of them. We think if it all gets in, it will  
13 be prejudicial.

14 THE COURT: I'm not sure as to the  
15 level of prejudice but what are we talking about, what  
16 other kinds of items?

17 MR. MONTA: There is a billfold. I  
18 don't know that that is identifiable. There is  
19 something called a prayer card, which I think would be  
20 clearly prejudicial, arousing sympathy.

21 THE COURT: Do you have a photograph of  
22 what was found?

23 MR. SLAVENS: Yeah, there is a photograph  
24 of State's Exhibit 47 and it's basically a downward  
25 shot into the sewer before the items were collected by

1 evidence technician Rick Smith. And I think that  
2 photograph is clear as to what was removed as well as  
3 was Rick Smith's testimony from what he removed from  
4 the sewer.

5 THE COURT: Of these items that are  
6 depicted in 47, how many of them have Mr. McDonald's  
7 some form of identification.

8 MR. SLAVENS: I don't know, your Honor.

9 THE COURT: There were at least a  
10 couple.

11 MR. SLAVENS: Oh, definitely.

12 MR. LAWSON: Several.

13 MR. SLAVENS: Yeah.

14 THE COURT: 48 will be admitted.

15 MR. MONTA: In its entirety?

16 THE COURT: In its entirety. Let the  
17 record reflect after the review of State's Exhibit 47  
18 and conjunction with the testimony of the witness who  
19 retrieved the items, along with the testimony of the  
20 other witnesses, specifically, but not necessarily  
21 exclusive of Mr. Polson and Mr. Elofskey, it's rather  
22 clear that, that these items are heavily  
23 circumstantially connected.

24 48 will be admitted.

25 49 through 78 will be

1 admitted.

2 80-A the coroner's slide  
3 has already been objected. Anything further for the  
4 record.

5 MR. MONTA: No.

6 THE COURT: That will be admitted.  
7 81-A through E is admitted. The rest of 80 is  
8 admitted.

9 The objections to 79 and  
10 Joint Exhibit I, Mr. Slavens, here's your opportunity  
11 to make a record that you've been wanting to make.

12 MR. SLAVENS: I'm done.

13 THE COURT: Are these -- these are the,  
14 one is a joint exhibit that apparently the defense is  
15 objecting to, am I correct on that?

16 MR. MONTA: Right.

17 THE COURT: The other is State's  
18 Exhibit 79. In summary, it's the Elofskey taped  
19 statement to the Dayton Police Department and the  
20 Polson taped interview to the Dayton Police  
21 Department. Do you want to make a record on this?

22 MR. SLAVENS: Well, I think we already  
23 done so. So the record is clear, we believe that both  
24 tapes, one, have been properly authenticated, two,  
25 that both tapes relayed to the various evidence rules



1 that we previously mentioned to the Court. One of  
2 which was the Evidence Rule 803(3)(B) an intent, plan,  
3 motive or design as to the declarant's participation  
4 therein.

5 And also and more  
6 specifically, these individuals, Mr. Polson and  
7 Mr. Elofskey, having undergone extensive  
8 cross-examinations as to their reason for this recent  
9 fabrication and plea bargain and they're here to lie  
10 today in court when in fact these defendants,  
11 co-conspirators made prior oral and videotaped  
12 statements to the police department and therefore  
13 their prior consistent statements are admissible under  
14 Evidence Rule 801(D)(1)(b) and we so move the Court.

15 THE COURT: Does the defendant want to  
16 be heard?

17 MR. ARNTZ: Well, only --

18 THE COURT: Over and above what's  
19 already been said.

20 MR. ARNTZ: No, nothing more than what  
21 we would have said previously on the record.

22 THE COURT: The objection is sustained.  
23 Let the record reflect those two videotapes were  
24 played to the jury ultimately with no objection, as I  
25 recall, from either party in both cases and the Court

1 feels to admit them as exhibits would give undue  
2 weight to that particular portion of the testimony.

3 MR. SLAVENS: May we be heard on that  
4 portion of the Court's ruling?

5 We believe that there are,  
6 I may be wrong in this, but as exhibits are in fact  
7 admissible and then the question becomes, whether or  
8 not the jury wants to see them and if the jury then  
9 decides that they, the jury, wishes to review those  
10 items, that a video playing mechanism be given to the  
11 jury. But I think at this point in time for the Court  
12 to assume that the jury does not want to listen to the  
13 tape, would be an infringement upon the jury's  
14 deliberation process. And we believe that the items  
15 should be accepted into evidence, go to the jury, and  
16 then if the jury wishes to view them, make them  
17 available for a view.

18 THE COURT: I'm not sure what I said in  
19 the record but, Mr. Slavens, I think I said just the  
20 opposite of what your argument -- read back was the  
21 reason.

22 MR. SLAVENS: You can restate it.

23 THE COURT: Just read back, would you,  
24 Joyce.

25 (WHEREUPON, the Court Reporter read back the

1 Court's last statement.)

2 THE COURT: That's my reason. And  
3 sustained.

4 MR. SLAVENS: Note our exception.

5 THE COURT: Your exceptions are noted.  
6 Any other exhibits we need  
7 to deal with?

8 MR. ARNTZ: None.

9 THE COURT: All right. Are we prepared  
10 to go forward with the motions at this time or are we  
11 going to wait?

12 MR. SLAVENS: I think there is a couple  
13 stipulations that we agreed to.

14 THE COURT: Do you want to do that in  
15 front of the jury?

16 MR. SLAVENS: We can or we can do it now,  
17 just so the lawyers are clear on it and we can redo.

18 I, I think basically the  
19 stipulations would be if Denise Rankin were called to  
20 testify, she would testify that the blood sample  
21 obtained by Marshall Manning at the Richard Blazer,  
22 1912 homicide scene is in fact consistent with the  
23 blood typing of Richard Blazer.

24 Also, an additional second  
25 stipulation that if -- to that one, am I correct?

1 MR. MONTA: Answer, I made it here.

2 She made four reports.

3 MR. SLAVENS: What I'm relating to is the  
4 blood.

5 MR. MONTA: That seems to be right.

6 MR. SLAVENS: The other stipulation would  
7 be that if John Marsh were called to testify, he would  
8 testify concerning examinations he conducted regarding  
9 latent prints viewed by him taken from the various or  
10 the two weapons, I forget the exhibit numbers, but  
11 specifically the Bryco and the Raven, and that there  
12 are no fingerprints on either of those items of value  
13 for him to make a comparison to Howe, Elofskey, or  
14 Polson.

15 Secondly, that that witness  
16 would testify that he examined some latent prints from  
17 the 1912 Tennyson address of Richard Blazer, those  
18 prints, latent prints from an area of the door leading  
19 out of the house. They were taken and lifted by  
20 Marshall Manning. And that those prints matched the  
21 known prints of Tony Elofskey.

22 THE COURT: Is that correct, Mr. Arntz  
23 or Mr. Monta, as to your understanding of the  
24 stipulation?

25 MR. MONTA: Well, we haven't discussed

1 all the elements of them. That's generally what we  
2 are talking about.

3 I believe there were, as  
4 far as Denise Rankin's testimony, I believe there was  
5 also an indication that none of the blood samples from  
6 either of the decedents were found on the clothing of  
7 our client, Mr. Howe. We would ask for a stipulation  
8 of that.

9 THE COURT: Well, apparently we are not  
10 at this point prepared on the stipulations then, so.

11 MR. MONTA: Well, the general topics,  
12 that's what I just said, I think the general topics we  
13 had and the general people who would have given.

14 MR. SLAVENS: As to that one tin. What  
15 else? I mean, I was only talking about that, the  
16 blood, there some discussion about the blood at Mr.  
17 Blazer's house and just that it was his blood.

18 MR. ARNTZ: I think we can arrive at  
19 some stipulations to the Court in final form first  
20 thing in the morning, if that's of any assistance. We  
21 are not just down to the fine print.

22 THE COURT: My only question, assuming  
23 there are stipulations, first of all, Mr. Slavens has  
24 to be advised because of the, obviously, the need for  
25 a witness. And hopefully we can do that. That

1 doesn't necessarily have to be done on the record.  
2 Whatever stipulation is worked out, we will put on the  
3 record.

4 Do counsel want the Court  
5 to read the stipulation to the jury as opposed to  
6 either one counsel?

7 MR. ARNTZ: I think we prefer that.

8 MR. MONTA: That will be fine.

9 THE COURT: That's normally how a  
10 stipulation is done in at least a lot of cases.

11 MR. SLAVENS: I don't care about the  
12 format, just as long --

13 THE COURT: All right. So with that  
14 then, assuming the stipulations are worked out as to  
15 these two witnesses, Marsh and Denise Rankin, the  
16 State, although not formally, resting at this time?

17 MR. SLAVENS: We are going to represent  
18 we would more than likely be concluded. Assuming that  
19 it is concluded, we'll then be resting.

20 THE COURT: Do we want to deal with the  
21 motions then at this point?

22 MR. ARNTZ: We prefer to do that in the  
23 morning after we provide the Court with the final form  
24 of the stipulation.

25 THE COURT: All right. Can we get

1 started at 9:30 as far as the jury is concerned? So  
2 that means everybody is here at 9, we will hit the  
3 record at 9:15. Any problem with that timing, Mr.  
4 Slavens? And hopefully get going with the jury at  
5 9:30. That means Mr. Howe is due back here at 9  
6 o'clock. And we'll go ahead and stand in recess.

7 And if I could see counsel  
8 for just a minute -- I'm already a half hour late for  
9 another meeting -- as to schedule and potential jury  
10 charge.

11  
12 (WHEREUPON, the proceedings for March 2,  
13 1993, were then concluded at the hour of 4:48 p.m.)

14 \* \* \* \*  
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1 (March 3, 1993 - Morning Session)

2 9:52 a.m.

3  
4 IN OPEN COURT - OUT OF THE PRESENCE OF THE JURY

5 THE COURT: Let the record reflect we  
6 are out of the presence of the jury.

7 Mr. Slavens.

8 MR. SLAVENS: Yes, your Honor.

9 I believe, I'm not sure if  
10 all of this was on the record yesterday but we'll be  
11 resting. I think we moved for the introduction of  
12 into evidence the various exhibits. The Court has  
13 ruled on those. I think those are on the record. We  
14 would like to reserve the right to rest in front of  
15 the jury but we will for the record, subject to that  
16 caveat, rest our case.

17 THE COURT: All right. Does the  
18 defense have any motions?

19 MR. MONTA: Thank you, Judge.

20 At this point under rule,  
21 Criminal Rule 29, which allows the Court on motion of  
22 defendant, or on its own motion after the State's  
23 evidence is closed, to move for acquittal based upon  
24 the fact that the evidence is insufficient to sustain  
25 a conviction. We make that motion as to all counts



1 and specifications.

2 THE COURT: All right. The motion for  
3 the directed verdict, pursuant to Rule 29 of the Ohio  
4 Criminal Rules, is overruled.

5 Does the defendant have any  
6 other motions as it relates to exhibits or any, or any  
7 other matter we want to deal with before we bring the  
8 jury in?

9 MR. ARNTZ: We would move at this time  
10 for admission of Defendant's exhibits as well.

11 THE COURT: And they are A and B. I  
12 believe Joint Roman Numeral I was admitted by the  
13 Court yesterday afternoon. Is Joint Exhibit Roman  
14 Numeral I the videotape statement?

15 MR. ARNTZ: Excuse me. That was agreed  
16 that that would not be admitted.

17 MR. SLAVENS: I disagree with that.

18 THE COURT: As to the agreement?

19 MR. SLAVENS: Yes.

20 THE COURT: It is correct that the  
21 Court has excluded the two videotaped versions of  
22 Mr. Polson and Mr. Elofskey's testimony.

23 Now as it relates to  
24 Defendant's A, this is a hand diagram by Officer  
25 Bryant.

1 MR. ARNTZ: Correct.

2 THE COURT: Any objection to that?

3 MR. SLAVENS: No objection.

4 THE COURT: B and C are request forms  
5 to see Detective Lawson from Mr. Elofskey while in the  
6 county jail.

7 MR. SLAVENS: I voice an objection. I  
8 believe, I may be incorrect, that the testimony from  
9 that came -- no, I stand corrected. I think it  
10 came -- there was testimony about that from Elofskey  
11 but he denied one of them and therefore it's  
12 inaccurate or has not been authenticated.

13 THE COURT: He did deny one of the  
14 four.

15 MR. ARNTZ: If I recall correctly, I  
16 think what he said was that he did not recognize one  
17 of the four request slips and something he made out in  
18 his own handwriting but he also went on to say that he  
19 in fact did want to see Detective Lawson on that day,  
20 something to that effect.

21 THE COURT: Well, just a minute. Let  
22 me actually physically look. I think he denied one of  
23 them by case number, jacket number, or whatever it  
24 was.

25 MR. SLAVENS: He did. And three of them

1 have the same jacket number. One of them has a  
2 different jacket number.

3 THE COURT: The jail request form that  
4 was specifically denied by Mr. Elofskey, which is part  
5 of Defendant's Exhibit B for identification purposes,  
6 its reference is jacket number A 8112-92, that would  
7 be sustained and will not go to the jury. It can be  
8 eliminated or subtracted from the form upon the other  
9 three. Now, with that understanding --

10 MR. SLAVENS: No objection, your Honor.

11 THE COURT: There is no objection from  
12 the State as to B and C as amended. And B is the one  
13 specifically effected and we'll deal with that.

14 All right. The defense  
15 is -- we are over to the defense side of the case.  
16 Does the defendant have any testimony to present?

17 MR. ARNTZ: We would be resting as  
18 well.

19 THE COURT: And do you reserve the  
20 right to do that in the presence of the jury also?

21 MR. ARNTZ: Yes, sir, we would.

22 THE COURT: All right. Pursuant to our  
23 discussions then in chambers, what the Court will do  
24 is bring the jury in, permit the State to rest, permit  
25 the Defendant to rest on the record, then explain to

1 the jury what is next in the process, tell them that,  
2 we'll have another relatively brief break, so we can  
3 finalize any discussions on instructions, and we'll go  
4 from there.

5 So let's bring the jury in.  
6 Anything further before the jury comes in?

7 MR. SLAVENS: No, your Honor.

8  
9 BEFORE THE JURY

10 THE COURT: Good morning, ladies and  
11 gentlemen of the jury.

12 THE JURY: Good morning.

13 THE COURT: We are moving along.

14 Mr. Slavens.

15 MR. SLAVENS: Yes, your Honor. As we  
16 previously indicated and for the record, State rests.

17 THE COURT: All right. Ladies and  
18 gentlemen of the jury, the State has rested its case.  
19 And we are now over to the defense portion of this  
20 matter.

21 Mr. Arntz or Mr. Monta.

22 MR. MONTA: If the Court please, at  
23 this time the defense would rest as well.

24 THE COURT: All right. You've heard  
25 the State and you've heard the Defense rest.

1 Now, ladies and gentlemen  
2 of the jury, I wanted to bring you in here so you  
3 would see this process. The next stage in the  
4 proceeding is what's called a closing argument. We  
5 are going to get to that in just a few minutes. There  
6 is a couple of minor things we need to deal with. You  
7 get to take another break. The bottom line to what  
8 I'm saying, you now know we are at the concluding  
9 portions of the trial, closing arguments by counsel,  
10 then the Court will give you instructions of law and  
11 then the matter will be in your hands to decide.

12 So if you would give us  
13 approximately 15 minutes, give or take a few either  
14 direction, we'd appreciate that, so that counsel and  
15 the Court, we have everything together. We will not  
16 go solidly through all the closing arguments and  
17 instructions without a break. We'll have a break at  
18 some point mid route of the next series of events but  
19 you should have the case and begin deliberating before  
20 noon. So with that, let's take a break.

21 Remember the usual  
22 instructions of the Court not to discuss the case  
23 among yourselves or with anybody else. We'll see you  
24 back in approximately 15 minutes.

25 (WHEREUPON, a recess was taken.)

IN CHAMBERS

10:17 a.m.

THE COURT: Let the record reflect that we are in chambers and we are discussing the charge to be given to the jury.

A couple of things. First of all, does the defense specifically waive the defendant's presence for the purpose of this brief record?

MR. ARNTZ: Yes, we would.

THE COURT: The second thing, Mr. Monta, you might want to respond to this because we were just talking about it while Mr. Arntz was not present. But does counsel desire the Court to, defense counsel desire the Court to inquire of the defendant as to whether or not he wants or should be testifying in this case.

MR. MONTA: I think we discussed that and indications are at present it's not necessary.

MR. ARNTZ: That's correct.

THE COURT: All right. So there is no need for the Court to make personal or direct inquiry of the defendant on that subject?

MR. ARNTZ: No, sir.

MR. MONTA: No.

1                   THE COURT:           All right. With that then,  
2     let the record further reflect we've had a couple of  
3     discussions in chambers as it relates to the jury  
4     instructions. The defendant has filed a requested set  
5     of jury instructions, which the State of Ohio has a  
6     copy of.

7                                   And the bottom line impact  
8     is that the Court is sustaining the defendant's  
9     request for, motion request for an instruction on the  
10    lesser included offense of involuntarily manslaughter.  
11    That's branch one.

12                                   Sustaining as to branch  
13    two, labeling, mere presence.

14                                   The testimony of an  
15    accomplice request, which is branch three of that  
16    request, has, will also be approved and be given to  
17    the jury.

18                                   Branch four of the  
19    defendant's request has been granted, however, the  
20    last sentence, that will be cut off. The last  
21    sentence will simply read: In determining what  
22    weight, if any, should be given the statement or  
23    statements, you should consider all the matters in  
24    evidence. Period.

25                                   And the balance of the

1 defendant's requested instruction will not be given as  
2 being not necessary and not necessarily the law.

3 MR. ARNTZ: If the Court please, we  
4 have also requested an instruction to the jury with  
5 regard to what they should do in the event they find  
6 equal inferences from the circumstantial evidence.  
7 This is an instruction that has traditionally been  
8 given for many years in criminal cases and we feel it  
9 would be appropriate and necessary today.

10 THE COURT: And that's correct. That  
11 also will be given.

12 And I believe I'm correct,  
13 Mr. Slavens, when I state that the State has no  
14 objection to any of the Court's rulings as it relates  
15 to the defendant's request, albeit perhaps  
16 reluctantly, but no specific objections. Am I  
17 correct? If I'm not, please state.

18 MR. SLAVENS: There is an objection to  
19 equal inferences which we, but we recognize the Court  
20 is going to give it, for the record, we voice an  
21 objection. I just make that objection for the record,  
22 your Honor, for whatever purpose the record may have  
23 and the State giving an objection.

24 THE COURT: Let the record reflect that  
25 for purposes of review, the Court is very much aware



1 of the state of the law as it relates to the requested  
2 instruction as it relates to inferences that are  
3 equally consistent with each other or are equally  
4 consistent with either the defendant being guilty or  
5 not guilty, that that's not a necessary instruction.  
6 The defendant and the State have both provided copies  
7 of the case in view of the nature of this case. The  
8 Court will go ahead and give this instruction at the  
9 request of the defendant for whatever, whatever  
10 purpose it may serve.

11 Now, on the record, does  
12 the defendant desire that I not make reference to the  
13 fact that he did not testify or that I go ahead and  
14 make the standard Ohio Jury Instruction reference that  
15 it is his constitutional right not to testify? Of  
16 course, I'm summarizing that particular instruction.  
17 Mr. Arntz.

18 MR. ARNTZ: We request that the Court  
19 give the traditional instruction that he has no  
20 obligation to testify.

21 THE COURT: All right. That will be so  
22 given.

23 All right. Anything else  
24 for the record?

25 MR. SLAVENS: I think the record should

1 show, I think, is the Court going, has the Court, is  
2 the Court going to give an instruction on aiding and  
3 abetting?

4 THE COURT: The Court will give an  
5 instruction of aiding and abetting.

6 MR. ARNTZ: We would object to the  
7 Court giving a general instruction on aiding and  
8 abetting as to all five of these counts for the reason  
9 that the bill of particulars filed February 18th by  
10 the State specified that with regard to the homicide  
11 counts, the defendant was the principal and that he  
12 did the shooting himself.

13 And with regard to the  
14 aggravated robbery and aggravated burglary counts, the  
15 bill of particulars specifies that he was a  
16 participant and provided assistance to the  
17 co-defendants with regard to those counts.

18 So our feeling is that the  
19 prosecutor has bound himself to those theories of his  
20 case which he set forth in the bill of particulars.  
21 And the purpose of the bill is to provide notice to  
22 the defense what theory the prosecution intends to  
23 present at trial. The prosecution attempted to  
24 present those theories at trial and we think it is  
25 unfair for the prosecution at the conclusion of all

1 the testimony to offer up new theories of culpability  
2 by now saying, well, if he wasn't the principal in  
3 these homicides, he ought to be convicted as an aider  
4 and abettor. We think that defeats the whole purpose  
5 of the bill of particulars, in that the prosecutor can  
6 declare one theory in advance of trial and in fact  
7 throughout the trial and then at the very end of the  
8 trial insist that the Court instruct as to another  
9 theory. This is a practice which would violate our  
10 client's right to due process and a fair trial.

11 THE COURT: Mr. Slavens.

12 MR. SLAVENS: If I may, your Honor, we  
13 recognize that the purpose of the bill of particulars  
14 is primarily to give the defendant notice. In  
15 essence, it is notice pleading. The purpose of giving  
16 a jury instruction is to educate the jury as to what  
17 the law is, as that law would apply to the facts as  
18 presented during the course of the trial. The fact  
19 that the State's theory has not, not changed as to  
20 any, as who we claim to be the shooter but based upon  
21 the evidence, primarily the, one, of the  
22 cross-examination is and the inference is made by the  
23 defense team in cross-examining Mr. Elofskey and  
24 Mr. Polson, and also, based upon the testimony of  
25 Detective Lawson concerning statements made by the

1 defendant Howe. There is the possibility that the  
2 jury could conclude that in one or both of the  
3 homicides that this defendant was not in fact the  
4 triggerman but that he was present with all the  
5 culpability required as an aider and abettor,  
6 therefore, they could so find, it's not a new theory,  
7 but I mean the fact that our theory is not new but the  
8 evidence, I think, justifies in order to prevent a  
9 potential miscarriage of justice that this instruction  
10 would be given as it is factually warranted.

11 THE COURT: All right. The Court has  
12 indicated to counsel, prior to making the record, the  
13 instruction would be given in its general context of  
14 the entire factual situation.

15 MR. ARNTZ: We would just like to note  
16 our position is that an aiding and abetting  
17 instruction might well be appropriate for the  
18 aggravated robberies and aggravated burglary, but not  
19 as to the homicides.

20 THE COURT: All right. Your position  
21 is clear and the Court has ruled. Okay.

22 MR. SLAVENS: Two points. We know the  
23 Court has given counsel time in regards to complete  
24 their closing arguments, the Court indicated to the  
25 jury he will give them a break. I would just, on

1       behalf of State, request at that break be a short one  
2       so they can go to the necessary room and then back and  
3       I would suggest maybe five minutes.

4               THE COURT:           Not only will it be short,  
5       I was going to ask counsel as to a logical point,  
6       probably at the conclusion of the defendant's closing  
7       argument.

8               MR. ARNTZ:           We would prefer that the  
9       break occur after the State's final argument finishes.

10              THE COURT:           Well, there is a rebuttal.

11              MR. ARNTZ:           That's what I mean, after  
12       the rebuttal.

13              THE COURT:           Go through the entire  
14       closing arguments then have a five minute break then  
15       instructions.

16              MR. SLAVENS:        That's fine with me.  
17       They're trying to prevent me from preparing for  
18       rebuttal. I think that's appropriate time.

19              THE COURT:           That's fine. Remember the  
20       jury will be sitting there.

21                                    As we speak, we agreed on a  
22       45 time limit, am I correct?

23              MR. ARNTZ:           With five minutes fudge  
24       factor I think we said.

25              THE COURT:           Keep in mind, the longer

1       they're sitting here in the middle of the morning. So  
2       we'll do all the closing arguments, we will take a  
3       brief break and then come back for the instructions.

4               MR. SLAVENS:       May I, your Honor, make a  
5       comment? In regards -- I recognize -- I hope the  
6       Court does not take an offense to what I'm going to  
7       say, but I, recalling back to voir dire examination,  
8       not with Mr. Arntz but with comments made by the Court  
9       in explaining to this jury the charges, and the Court,  
10      I think, maybe at least as I looked at it, please  
11      don't take offense to it, stressed quite seriously and  
12      numerous occasions the fact that the defendant pled  
13      not guilty. And when you did that, you make an  
14      inflection in your voice. And your voice does carry  
15      quite well. And you denoted, if you will, the  
16      seriousness of the situation. I would just ask the  
17      Court in giving the instructions to the jury that all  
18      instructions be basically with the same inflection. I  
19      mean, I think the Court when it gets to certain areas  
20      of instruction, may inform the jury this is very  
21      important, this is very important. I think all the  
22      instructions are equally important. I hope the Court  
23      does not take offense.

24             THE COURT:           It's in the record.

25                           Any response?

1 MR. MONTA: For the record, we didn't  
2 notice those inflections.

3 THE COURT: For the record, either did  
4 the Court. But I will do what I do. I will let the  
5 record speak for itself.

6 THE COURT: Off the record.

7  
8 IN OPEN COURT - BEFORE THE JURY

9 10:37 a.m.

10 THE COURT: Ladies and gentlemen of the  
11 jury, we are at that point in the trial that's called  
12 the closing arguments or closing statements by  
13 counsel. We will now proceed with those. Remember,  
14 what the lawyers tell you is not evidence. You heard  
15 the evidence from the witness stand and the various  
16 exhibits. The Court will tell you specifically what  
17 the evidence is and what I can tell you is not  
18 evidence is what the attorneys say to you at this  
19 point. It is a summary of the situation from the  
20 attorney's standpoint.

21 Now I want to caution you  
22 on a couple of things here. I'm sure I speak for all  
23 the lawyers involved. That if an attorney misstates  
24 the evidence that you remember to be, I'm saying two  
25 things here, I'm sure that it is not done

1 deliberately. There is one of them. That's why there  
2 is 12 of you. The second part of that statement is if  
3 your recollection differs from that of what you hear  
4 the attorneys say that the evidence showed, you rely  
5 on your collective memories to determine what the  
6 evidence in fact was.

7 With that then, is the  
8 State ready to proceed?

9 MR. DUNDES: Yes, your Honor.

10 THE COURT: Defense ready?

11 MR. ARNTZ: (Nodded in the  
12 affirmative.)

13 THE COURT: You may proceed, Mr.  
14 Dundes.

15 MR. DUNDES: Judge Dodge, counsel, Mr.  
16 Slavens, ladies and gentlemen of the jury. I would  
17 like to take a brief second to thank you for your time  
18 and your patience, your attention you've given us in  
19 the last two weeks. I know it's been a difficult  
20 time. We are close to the end, so I thank you for  
21 that.

22 At the beginning of this  
23 trial you heard inferences that the State of Ohio  
24 would not be able to connect the Mark McDonald  
25 homicide and the Richard Blazer homicide. There were



1 statements made that there was no one there to  
2 testify. All the State of Ohio had were witnesses  
3 what people said happened out there. In a case of  
4 this nature we know, counsel knows that the victims,  
5 Mark McDonald and Richard Blazer, are deceased. They  
6 couldn't come in and testify. They're dead. I wasn't  
7 there. Counsel wasn't there. Mr. Slavens wasn't  
8 there. You weren't there.

9 At the beginning of this  
10 trial you heard testimony from police officers who  
11 arrived on the scene where Mark McDonald was murdered  
12 at Monument and Findlay. They came in and testified  
13 to what they found when they got there. You also  
14 heard testimony from police officers at the 1912  
15 Tennyson Avenue residence, homicide of Richard Blazer.  
16 They came in and they testified what they found when  
17 they got there. They weren't there when it happened.

18 But we do know from  
19 testimony in this trial from this witness stand that  
20 there were people there at each homicide. And how do  
21 we know that? Well, we know that this defendant was  
22 there. We know that because he told Detective Tom  
23 Lawson that he was out there. He was at the Monument  
24 and Findlay Street address. In fact, he told this  
25 detective that he killed Mark McDonald. We also know

1       that he told this detective that he was at the 1912  
2       Tennyson Avenue residence of Richard Blazer. He was  
3       there. He told that to Detective Lawson.

4                       Who else was there? You've  
5       heard testimony from Walter Polson. You've heard  
6       testimony from Tony Elofskey. They were there at the  
7       Findlay and Monument Street location. They told you  
8       that this defendant killed Mark McDonald. They were  
9       also present at the 1912 Tennyson Avenue residence of  
10      Richard Blazer. And there is no dispute they told you  
11      that this defendant killed Richard Blazer. They were  
12      there.

13                    They came in, Walter Polson  
14      and Tony Elofskey, and they told you in the early  
15      morning hours of June 22d, 1992, that they were  
16      together along with this defendant, Weston Lee Howe,  
17      Junior. And they met up with Mark McDonald in the  
18      area of Deeds Park and Helena Avenue area. And later  
19      that evening they met him again in a field at Monument  
20      and Findlay Avenue. And they told you when they went  
21      out there, that Weston Lee Howe had hid in the front  
22      seat and Walter Polson was hidden in the back seat and  
23      Walter Polson had a gun, a 25 caliber Raven, silver or  
24      nickel plated gun. And that this defendant also had a  
25      gun a 25 caliber semiautomatic handgun, a Bryco, which

1 was black in color. They told you they went out there  
2 to rob someone. They go out there. And testimony was  
3 that this defendant shot Mark McDonald three times.

4 Later that evening they get  
5 together again and they talk about going out and  
6 robbing a person by the name of Richard Blazer. They  
7 met him earlier in the afternoon, Walter Polson and  
8 Tony Elofskey. The three of them, Tony Elofskey,  
9 Walter Polson, and Weston Lee Howe, Junior, went out  
10 to 1912 Tennyson Avenue residence. And while there,  
11 in an attempt to rob him, he was killed. And he was  
12 killed by this defendant as he was exiting his house.

13 Due to the commission of  
14 these crimes, this defendant was indicted by the  
15 Montgomery County Grand Jury on five specific counts.  
16 And as Mr. Slavens told you earlier, the State has to  
17 prove and believes has proved beyond a reasonable  
18 doubt each and every element of those separate counts.

19 Weston Lee Howe, Junior, in  
20 this particular case, Count One, was indicted and  
21 charged with aggravated murder, that count carrying  
22 with it a firearm specification. Count Two -- that  
23 particular count is with regard to Mark McDonald.

24 Count Two, aggravated  
25 murder with regard to Richard Blazer. That count

1 carries with it a firearm specification.

2 Count Three, aggravated  
3 robbery as it relates to Mark McDonald. That count  
4 also carries with it a firearm specification.

5 Count Four, aggravated  
6 robbery. That counts relates to Richard Blazer. That  
7 also carries with it a firearm specification.

8 Count Five, aggravated  
9 burglary. That counts relates to Richard Blazer. It  
10 also carries with it a firearm specification.

11 Count One, aggravated  
12 murder. The State of Ohio has shown beyond a  
13 reasonable doubt that in Montgomery County, Ohio,  
14 Weston Lee Howe, Junior, on or about June 22d, 1992,  
15 did purposely cause the death of Mark McDonald while  
16 committing or attempting to commit or while fleeing  
17 immediately after committing or attempting to commit  
18 an aggravated robbery.

19 How do we know that? Well,  
20 we know from the testimony that Tony Elofskey, Walter  
21 Polson, and Weston Lee Howe, Junior, went to Monument  
22 and Findlay Street address with their purpose to rob  
23 Mark McDonald. That was their plan and they did it  
24 together. When we went out there, we know that -- let  
25 me strike. We know that Walter Polson had a 25

1 caliber gun, a nickel plated gun. We also know that  
2 Weston Lee Howe, Junior, had a 25 caliber  
3 semiautomatic black Bryco gun. They get out there and  
4 Weston Lee Howe, Junior, shoots Mark McDonald three  
5 times. Shoots him once in the mouth, once in the  
6 chest, and once in the hand. Caused the death of  
7 another.

8 We heard testimony from Dr.  
9 Smith that Mark McDonald died from multiple gunshot  
10 wounds. We also heard testimony he retrieved two  
11 bullets from his body. Those particular bullets were  
12 compared by Bud Haemmerle, a firearms examiner. He  
13 told you those bullets came from a 25 caliber  
14 semiautomatic Bryco, the black gun you saw here as  
15 part of evidence.

16 Aggravated robbery. Well,  
17 there was testimony that Weston Lee Howe, Junior, had  
18 on or about his person that black gun after shooting  
19 Mark McDonald. We know that Weston Lee Howe, Junior,  
20 chased him down. We heard testimony that he followed  
21 him and chased him. And after catching him, he took  
22 his wallet. He got 5 dollars, 5 dollars from him.  
23 There was also testimony that when he got to him, that  
24 his gun jammed and he would have shot him again if  
25 that wouldn't have happened. And you heard testimony

1 that Walter Polson heard a siren and they both ran to  
2 get back in the car with Tony Elofskey. He would have  
3 shot him again at that point. That's purposeful.

4 Firearm specification. You  
5 heard Bud Haemmerle testify that the 25 caliber Bryco,  
6 the black gun, was fully operable.

7 Count Two, aggravated  
8 murder. On or about June 22d, 1992, in Montgomery  
9 County, Ohio, this defendant, which was identified in  
10 this courtroom, Weston Lee Howe, Junior, did purposely  
11 cause the death of another, Richard Blazer, while  
12 committing or attempting to commit or while fleeing  
13 immediately after committing or attempting to commit  
14 an aggravated robbery.

15 How do we know that? Well,  
16 the witnesses testified at this stand, Walter Polson,  
17 Tony Elofskey, they got together with Weston Lee Howe,  
18 Junior, on June 22d, 1992, and they got together at  
19 the Valley Street residence and they discussed that  
20 they were going to go out to Richard Blazer's house  
21 and rob him. In fact, Weston Lee Howe, Junior said  
22 when he got there, he was going to take things of  
23 value and sell them.

24 Weston Lee Howe, Junior,  
25 goes out to the residence with Tony Elofskey and

1 Walter Polson and waits outside. You heard their  
2 plan. They were working together. Weston Lee Howe,  
3 Junior, was to stay outside, the other two guys were  
4 to go in. That's what happened. Inside is an  
5 argument. Richard Blazer comes out the door following  
6 Tony Elofskey, he's shot three times by Weston Lee  
7 Howe, Junior, shot three times. Shot once in the  
8 head, once in the chest and once in the right  
9 collarbone, all from the right side as he's exiting  
10 the door.

11 And you heard testimony  
12 from Dr. Smith that Richard Blazer died from multiple  
13 gunshot wounds. And he extracted three bullets from  
14 Richard Blazer's body.

15 Bud Haemmerle came in and  
16 testified and he told you that the three bullets taken  
17 from the body of Richard Blazer came from the same 25  
18 caliber Bryco semiautomatic handgun that killed Mark  
19 McDonald, same gun, his gun, Weston Lee Howe, Junior's  
20 gun, while committing or attempting to commit or fleeing  
21 immediately thereafter, aggravated robbery.

22 We know from the testimony  
23 that the plan was to go out to Richard Blazer's house  
24 and rob him, take things of value. You heard that from  
25 Walter Lee -- Walter Polson and Tony Elofskey. They

1 told you that. They were there. We weren't. They know  
2 what was going on. Weston Lee Howe told you he was  
3 going to take things and sell them -- I'm sorry -- the  
4 evidence would show that is what he was going to do.  
5 And when he went out there, he had on or about his  
6 person a deadly weapon, a firearm. And you heard  
7 testimony from Walter Polson and Tony Elofskey that he's  
8 the one that shot and killed Richard Blazer. He had the  
9 gun on him.

10 This count also carries a  
11 firearm specification. And Bud Haemmerle again came in  
12 and testified that the 25 caliber Bryco semiautomatic  
13 black handgun is the gun that the bullets from Richard  
14 Blazer's body was extracted. It works.

15 Count Three, aggravated  
16 robbery. On or about the 22d day of June, 1992, in  
17 Montgomery County, Ohio, Weston Lee Howe, Junior, again  
18 identified in the courtroom, in attempting or committing  
19 a theft offense or in fleeing immediately after such  
20 attempt or offense, did have a deadly weapon, a firearm,  
21 on or about his person or under his control. This count  
22 relates to Mark McDonald. And you've heard testimony  
23 over and over again that he was there at the Monument  
24 and Findlay Avenue area. And you heard testimony that  
25 he had the 25 caliber semiautomatic Bryco black handgun